IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO . 2973 OF 2005

Suresh M. Toprani & ors. . .... Petitioners.

vs.

State of Maharashtra ... Respondents

K. R. Parekh for Petitioner
Ms. V. Mhaispurkar AGP for Respondent

CORAM: SMT. NISHITA MHATRE J.

Date: 19/9/2005

P.C.

This petition challenges the order of the trial court dated 4th September 2004 and the Appellate Court order dated 7th February 2005. The trial court has dismissed the suit on 4.9.04, by passing the following order:

> "Employee of the Plaintiff and advocate holding for Plaintiff , advocate Mr. Harshad Mehta and defendant's advocate are present. Record shows that parties seeking adjournment since last more than two years on the ground of settlement. As there is no progress. Hence I dismiss the suit."

2. The Appellate Court after considering the submissions of either side

has held that the appeal is not maintainable in view of the order of the trial court having been passed under the provisions of Order 17 Rule 3 of C.P.C.

3. There is no dispute between the parties that after the suit was filed parties sought adjournments on the ground that negotiations were in progress and that they were endeavouring to settle the dispute between them. It appears that the trial court refused to adjourn the matter on 4th September 2004 on the ground that the suit had been adjourned for more than two years for the same reason i.e., for settling the dispute amicably, and no progress has been made. The Appellate court after considering all the submissions of the appellants held that the order was not passed under Order 17 Rule 3 but was passed under Order 10 Rule 4 C.P.C.

4. In my view the Appellate Court has erred in passing such an order. There can be no doubt that both parties were ad idem when the matter was to be settled and the adjournment was sought to put an end to the dispute. Adjournments on all occasions were given 'for settlement'. Although the suit was set down for hearing it was agreed between the parties that the matter would be settled. Unfortunately for more than two years no settlement was possible. The trial court therefore was in error in dismissing the suit. The trial court in fact ought to have given an opportunity to the Petitioner. I

am of the view that the order was passed was under Order 10 Rule 4 and not one under Order 17 Rule 3. In this view of the matter the order of the trial court and the Appellate Court is set aside. Parties shall appear before the trial court on 10th October 2005. The trial court shall permit the Petitioner to lead evidence and shall determine the dispute. Petition disposed of accordingly.

(SMT. NISHITA MHATRE J.)

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